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No. 1222

In the

Supreme Court of the United States

OCTOBER TERM, 1968

S. H. LYNCH & CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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In the

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OCTOBER TERM, 1968

S. H. LYNCH & CO., INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

S. H. Lynch & Co., Inc., Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 9, 1969 (Appendix A, *infra*, p. A1).

Opinions Below

The case was before the court of appeals twice. The December 19, 1968 opinion here in issue is not yet officially reported, but is printed in Appendix B, *infra*, pp. Bi-3. The first opinion, reported at 377 F. 2d 558 (5th Cir. June 8, 1967), is printed in Appendix C, *infra*, pp. C1.

The case was also before the National Labor Relations Board twice. The Board's original Decision and Order, 160 N.L.R.B. 113 (July 6, 1966), is printed in Appendix C, *infra*, pp. C2-11. The Trial Examiner's Supplemental Decision and Order (November 20, 1967) and the Board's Supplemental Decision and Order (June 14, 1968) are reported at 171 N.L.R.B. No. 167 and are printed in Appendix B, *infra*, pp. B4-17 and pp. B18-45.

Jurisdiction

The judgment of the Court of Appeals was entered on January 9, 1969 and rehearing was denied on February 27, 1969 (App. A, *infra*, pp. A1-3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

A panel of judges of the court of appeals held that certain undisputed evidence was not sufficient, on the record considered as a whole, to support an ex parte finding of the National Labor Relations Board, and thus remanded this case to the Board for a hearing. After that hearing, this case was appealed for the second time and assigned to a different panel of the court of appeals.

The question presented is whether the panel which heard the second appeal could, without reason, disregard the "law of the case" established by the decision of the first panel and hold that the identical undisputed evidence was sufficient to support the very same finding by the Board.

Statutes Involved

No statutes are directly involved in this case. Indirectly involved are those portions of 28 U.S.C. § 160(e) and 28 U.S.C. § 160(f), concerning petitions for enforcement and for review of orders of the NLRB, which provide:

> ". . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ."

Statement

Shortly before a representation election, the Union,[1] by leaflet, made material misrepresentations regarding wages and insurance benefits[2] it had supposedly obtained for members in another city (R. 165, 67-77).[3] Petitioner S. H. Lynch & Co.—the Employer (a Schlitz beer distributor)—first learned of this leaflet on Wednes-

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[1]International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.

[2]*The Union leaflet* (R. 165), entitled "It Does Not Cost—It Pays to Belong: Look at the Comparison and See for Yourself", *was*—as the court of appeals noted (App. B, infra, p. B2—*"concededly false and misleading in several respects"*: (i) It misrepresented that the wages of "helpers" under the Union contract in Houston, Texas were more than double those of Petitioner's 16 "helpers" in Dallas (R. 70-72, 153-54, 165). (ii) It misrepresented the wages and commissions of the "drivers" and "kegmen" of Petitioner (R. 68-70, 153-54, 165). (iii) And, it misrepresented that Petitioner's employees were paying $11.50 per month for the same insurance benefits which Houston Union members were receiving free (R. 73-77, 166-94). These misrepresentations are detailed in the Employer's objections to the election (R. 114-23).

[3]The Transcript of Record is in three volumes. All references are to Volume II unless otherwise indicated.

day about 9:30 a.m., not quite two days before the election scheduled for early Friday morning, 7:00-7:30 a.m. (R. 57, 60-61). The Employer had, by Wednesday noon, studied the leaflet and discovered the Union's misrepresentations (R. 66-68, 77).

The Employer then promptly sought legal advice. It sent the leaflet to its attorney and met with him on Thursday morning (R. 77-78, 83-88). Later that day, the Employer's attorney attended the pre-election conference; there, he asked the Union representative about the leaflet (R. 96-98). When thus confronted, the Union representative admitted the misrepresentations regarding wages[4] and requested a postponement of the election (R. 90-91, 97-98, 103). The Employer agreed (R. 90-94), so that it would have time to effectively rebut the Union's misrepresentations. However, the Regional Director refused to delay the election for "time for additional electioneering" and advised that "an objection to the election . . . could be filed and it would be heard in due course" (R. 92).

Board's First Decision

The election was held and the Union won by a 38-22 vote[5] (R. 15). Objections to the election based upon the

[4] Within two weeks after the election, the Union again admitted the misrepresentations regarding wages and also admitted those concerning insurance benefits by distributing a *revised* leaflet to the employees of other nonunion beer distributors in Dallas—in which it purported to correct the misrepresentations made in the original leaflet distributed to Petitioner's employees (R. 34, 105-08, 195-96).

[5] Thus a difference of only eight notes would have changed the result of the election. See United States Rubber Co. v. NLRB, 373 F. 2d 602 (5th Cir. 1967) and Graphic Arts Finishing Co., Inc. v. NLRB, 380 F. 2d 893 (4th Cir. 1967), where differences of 6 and 4 votes, respectively, would have changed the election results.

Union's admitted misrepresentations were duly filed by the Employer (R. 15, 114-23). The Board refused to grant a hearing on these objections. It concluded, upon the basis of an ex parte investigation, that the Employer had adequate time to answer the misrepresentations in the Union leaflet (App. C, *infra*, p. C5). This finding was based solely upon this undisputed evidence: the Employer knew of the misrepresentations not quite two days before the election, but made no effort to correct or rebut them (R.-Vol. I, 37, 80-82).

Reversal in First Fifth Circuit Appeal

The Employer appealed,[6] and the case was assigned to a Fifth Circuit panel composed of Judges Rives, Wisdom, and Goldberg.[7] There the Board vigorously contended that no material issues were presented by the objections and thus no hearing was required because, as a matter of law, the period of almost two days (established by the undisputed evidence) was adequate time for the Employer to effectively rebut the Union's misrepresentations.[8]

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[6]After refusing to recognize and bargain with the Union following its certification, solely for the purpose of obtaining review—in the only manner permitted by law—of the validity of the representation election. Boire v. Greyhound Corp., 376 U. S. 473, 476-79 (1964).

[7]S. H. Lynch & Co., Inc. v. NLRB, 377 F. 2d 558 (5th Cir. 1967) (per curiam).

[8]The Board's Brief asserted: ". . . the Company had approximately 2 days after the discovery in which to refute the leaflet's statements. . . . The Company, however, made no attempt to communicate with its employees" (p. 13) and ". . . the 'facts' . . . presented by the Company . . . are insufficient to warrant overturning the election because the Company had adequate opportunity to reply. . . ." (p. 20).

The first Fifth Circuit panel flatly rejected this contention! It vacated the Board's order and remanded the case for hearing on the "substantial and material issues."[9] The decision "necessarily determined"[10] that the two-day period was not, as a matter of law, sufficient time for the effective rebuttal of the Union misrepresentations. (If it had been, no hearing would have been necessary.) *The evidence then before that first panel*—the conceded, undisputed facts that the Employer knew of the Union misrepresentations almost two days before the election, but did not attempt to correct them—*simply could not, by itself, support the finding by the Board that the Employer had "adequate time to answer the Union's misrepresentations*" (App. B, *infra*, pp. B2-3).

Trial Examiner's Decision on Remand

On remand, a hearing was held before a Trial Examiner pursuant to the mandate of the first panel (R. 42-113). But neither the Board's attorney at this hearing

[9] United States Rubber Co. v. NLRB, 373 F. 2d 602 (5th Cir. 1967).

[10] The opinion by the first Fifth Circuit panel was a per curiam one (377 F. 2d 558), but this makes no difference. No hearing would have been required if, under the undisputed evidence before the first panel, the Employer had had adequate time for rebuttal. In remanding the case for a hearing, the first panel thus "necessarily determined" that there was not adequate time for rebuttal under this undisputed evidence (R. 55-56). See Prudential Ins. Co. of America v. Morrow, 368 F. 2d 813 (5th Cir. 1966) (applying the rule of the "law of the case" to a matter which was "necessarily determined" by a prior appeal concerned primarily with another issue).

nor the attorney appearing there for the Union introduced any evidence to support the Board's earlier conclusion—which the Fifth Circuit had rejected (377 F. 2d 558)—that the period of almost two days was sufficient time for rebuttal of the leaflet.[11] Instead, every bit of evidence regarding this issue was introduced by, and was completely favorable to, the Employer (R. 57, 63-65, 77-80, 84-88). The Trial Examiner thus concluded that, beyond doubt, the Employer did not have sufficient time to effectively reach the employees or to effectively rebut the Union's misrepresentations (R. 35-39; App. B, *infra*, pp. B39-43). He ruled, in particular:

> i) that, after discovering the Union's misrepresentations on Wednesday, the Employer clearly had a right to obtain legal advice; that this was "reasonable and practical"; and it was done at "the earliest opportunity" and neither the Employer nor its attorney unreasonably or deliberately delayed the conference (R. 36-37; App, B, *infra*, pp. B-40-41).[12]

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[11]The Board's attorney introduced no evidence at all, other than the "formal documents", i.e., the pleadings in the remanded case (R. 45, 113). The Union's attorney presented only one witness, the Union representative, who testified *only* about his distribution of the leaflet which made the admitted misrepresentations, the pre-election conference when the Union requested a postponement of the election because its misrepresentations had been discovered, and the Union's supposed, last-minute "correction" efforts (see footnote 23 *infra*), (R. 95-102, 109-10).

[12]Clearly, the Employer's meeting with its counsel was no guise designed to evade an opportunity to rebut the misrepresentations and thus perfect objections to the election. The possibility of objections to the election was not even considered or discussed at this meeting (R. 84, 37). Furthermore, the Employer's good faith was plainly demonstrated by its agreement at the pre-election conference to the Union's request for a short postponement of the election—to give the Employer the time needed to effectively rebut the misrepresentations (R. 24, 40, 92).

ii) that, following this conference on Thursday morning,[13] there was simply no way for the Employer to effectively reach the employees: a *meeting* was precluded by the Board's "24-hour" rule, Peerless Plywood Co., 107 NLRB 427 (1953); *letters* could not have been delivered until after the election; a *bulletin board notice* would have been seen by only a few employees and read by even less; the cost of 61 lengthy *telegrams* was prohibitive; and neither a telegram nor a *leaflet* distributed just before an election would have been an "effective" rebuttal (R. 37-39; App. B, *infra*, pp. B-42-43).[14]

Accordingly, the Trial Examiner recommended that the Employer's objections be sustained and the election be set aside (R. 41; App. B, *infra*, pp. B45).

Board's Second Decision

The Board, however, again concluded that the Employer had adequate time to answer the Union's misrepresentations (R. 1-13; App. B, *infra*, pp. B-9-10). *That finding was based upon this and this alone:* the

[13]The Trial Examiner further found that *even on Wednesday*—if *the Employer* had not sought legal advice after learning of the misrepresentations—it *could not have effectively reached the employees and effectively rebutted the misrepresentations.* The drivers and helpers quit work at various times during the day after completing their routes, not at any given time, and would not wait perhaps hours for a meeting "after work" (R. 78-79). Since Wednesday was the lightest work day (R. 79), most of the employees would have already left for the day by the time any reply to the Union leaflet could have been formulated (R. 38, 78-79). Thus, letters, a bulletin board notice, or leaflets would have been just as futile on Wednesday as on Thursday, and the cost of telegrams just as prohibitive (R. 37-39; App. B, *infra*, pp. B42-43).

[14]There is a critical difference between a mere "reply" and an *effective* "rebuttal" or "refutation" of union misrepresentations. An employer's telegram on the day before an election is not an effective rebuttal of a union's misleading wage comparisons—and it has been so held. NLRB v. Houston Chronicle Publishing Co., 300 F. 2d 273, 279 (5th Cir. 1962). The same is true of a leaflet distributed by an employer just before a representation election. NLRB v. Trancoa Chemical Corp., 303 F. 2d 456, 460 (1st Cir. 1962).

conceded, undisputed evidence that the Employer had knowledge of the misrepresentations almost two days before the election, but made no attempt to rebut them. *This was precisely the same basis for the Board's decision in the first appeal—and this was precisely the same undisputed evidence which the first Fifth Circuit panel held would not support the Board's finding.* (377 F. 2d 558) (See footnote 10, *supra*).

The Board ignored the fact that no additional, supporting evidence had been introduced at the hearing before the Trial Examiner. It ignored the above findings and conclusions by the Trial Examiner. And, it totally ignored the Fifth Circuit's mandate and simply rendered the very same holding on this issue that had already been reversed by the first panel of that court. This is demonstrated, very graphically, by a comparison of the evidence stated in both Board decisions in support of this finding. In the first, reversed proceeding, this was *all* of the evidence relied upon:

. . .

> "The union propaganda (Exhibit A) . . . came to the attention of the employer around 9:30 a.m. on November 17, 1965, two days before the election.
> . . .
> . . . the Employer acknowledges that a copy was in its possession two days before the election. . . . The undersigned, concludes, therefore, that . . . the Employer had sufficient time and information to correct the false information if it had been so inclined."[15]

[15]Regional Director's Report on Objections (R. -Vol. I, 37) adopted in toto by the Board's Decision and Certification of Representative (R. -Vol. I, 80-82; App. C, *infra*, pp. C5).

In the second (Supplemental) Decision (R. 1-13; App. B, *infra*, pp. B4-17), the Board cited *only* this very same conceded, undisputed evidence in support of its conclusion (contrary to that of the Trial Examiner) that there was time for effective rebuttal:

> ". . . Respondent . . . was satisfied on November 17 that 'gross' misrepresentations had been made as to (wage rates and insurance). It did not communicate with the Union on this matter until November 18. . . . On November 17, Respondent had all the facts. . . ." (R. 6-7: App. B, *infra*, pp. B10).

Second Fifth Circuit Appeal

The Employer again appealed to the Fifth Circuit. This time the case was assigned to a completely different panel — one composed of Circuit Judges Tuttle and Gewin and District Judge Pittman (App. B, *infra*, pp. B1-3). This panel summarily held (in a per curiam opinion) that the Board's finding that the Employer had adequate time for rebuttal was supported by this undisputed evidence:

> ". . . The company became aware of the leaflet and the misrepresentations it contained sometime during the morning of Wednesday, November 17. However, the company made no effort whatever to correct or rebut the statements contained in the leaflet prior to the election." (App. B, *infra*, pp. B2).

These identical facts were the sole basis for the Board's first decision. They were the same undisputed facts held totally insufficient by the First Circuit panel which heard the first appeal and remanded this case for

hearing. The Board's second decision was based on these very same facts, and no others. *The decision by the second Fifth Circuit panel* — that this evidence, and this evidence alone, is sufficient to support the Board's finding — *is thus directly contrary to the decision by the first panel.*

The panel which heard the second appeal has, without giving any reasons for its actions, completely disregarded the "law of case" established by the decision of the first panel — and has held, contrary to the first panel, that the identical undisputed evidence was sufficient to support the very same finding by the Board.

Reasons for Granting the Writ

This petition presents a question of critical importance: the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Supreme Court Rule 19(1)(b).

One panel of the Fifth Circuit has completely disregarded an earlier decision rendered on the precise point by a different panel in a prior appeal of the very same case. Identical undisputed evidence found insufficient by the panel of Judge Rives, Wisdom, and Goldberg is now—after some 1½ years—found to be sufficient, after all, by a panel of Circuit Judges Tuttle and Gewin and District Judge Pittman. *The Employer has lost only because a different panel of judges heard the second appeal.*

This is clearly unwarranted. It calls imperatively for the application of the doctrine of the "law of the case." That established principle, of course, has been recognized by this Court,[16] by various courts of appeals,[17] and indeed by the Fifth Circuit itself.[18] It commits the second panel of a multi-judge court to the decision by another panel in a prior appeal of the same case — in the absence of "most compelling circumstances." *Lincoln National Life Ins. Co. v. Roosth*, 306 F. 2d 110 (5th Cir. 1962) (en banc), cert. denied, 372 U. S. 912 (1963); *Prudential Ins. Co. of America v. Morrow*, 368 F. 2d 813 (5th Cir. 1966).

Here, the court of appeals below did not even purport to find some "most compelling circumstances" to justify its actions in ruling directly contrary to the first panel's decision in the prior appeal. And, there certainly were no such circumstances which would have permitted the disregard of the "law of the case." This was a simple question regarding the sufficiency of the same, undis-

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[16]Roberts v. Cooper, 61 U. S. 467 (1858); Brown Shoe Co. v. United States, 370 U. S. 294, 309 (1962); Insurance Group Comm. v. Denver & R. G. W. R. Co., 329 U. S. 607, 612 (1947).

[17]Trice v. Commercial Union Assur. Co., 397 F. 2d 889 (6th Cir. 1968); Chicago, St. P.M. & O. Ry. Co. v. Culp, 102 F. 2d 352 (8th Cir. 1939). And see those cases from other circuits cited in footnote 1 of Lincoln National Life Ins. Co. v. Roosth, 306 F. 2d 110, 113 (5th Cir. 1962) (en banc), cert. denied, 372 U. S. 912 (1963).

[18]White v. Murtha, 377 F. 2d 428, 431 (5th Cir. 1967); Prudential Ins. Co. of America v. Morrow, 368 F. 2d 813 (5th Cir. 1966); Lincoln National Life Co. v. Roosth, 306 F. 2d 110 (5th Cir. 1962) (en banc), cert. denied, 372 U. S. 912 (1963).

puted evidence to support a Board finding. As stated in *Roosth:*

> "... while this (the doctrine of the law of the case) is a rule guiding decision in a given case, the Court is not compelled to follow its former decision. ...
>
> But we think that when the issue resolves itself, as it does so clearly here, into a question of whether the same body of evidence is enough to permit a jury submission, neither a subsequent, second, or third, panel of this Court, nor the whole Court sitting en banc, should ordinarily undertake to review the correctness of the first decision or, doing so, arrive at a contrary conclusion. ..." (306 F. 2d at 113).

Of course, the question of whether a conclusion of the NLRB is supported by the same, undisputed evidence calls just as "imperatively for the application of the doctrine of the law of the case" as does an issue of the evidence to support jury submission or verdict. See, e.g., *Henry I. Siegel Co. v. NLRB*, 340 F. 2d 309 (2d Cir. 1965); *NLRB v. Sterling Furniture Co.*, 227 F. 2d 521 (9th Cir. 1956). This is particularly so in view of the numerous cases returned to the Board for hearings—by the Fifth Circuit and by other courts of appeals.[19] These hearings will be rendered meaningless and the parties subjected to needless delay and expense if—as was done in the present case—the panel hearing the second appeal simply ignores the decision of the first panel in the same case.

[19] See, e.g., the exhaustive list of these cases in the opinion in NLRB v. Bata Shoe Co., 377 F. 2d 821, 825-26 (4th Cir. 1967) and in footnote 11 in Howell Refining Co. v. NLRB, 400 F. 2d 213 (5th Cir. 1968).

Thus, the question presented by this petition is of concern far beyond this particiular controversy; it is an important and recurring one. *The law of the case rule is the "accepted and usual course of judicial proceedings."* Its disregard would subject the courts, litigants, and the bar to needless, repetitive judicial consideration of the same issue. Particularly with the increasing number of judges on the various courts of appeals,[20] public policy *demands* uniformity between different panels of the same court on identical issues. Most certainly:

> ". . . in a multi-Judge Court it is most essential that it acquire an institutional stability by which the immediate litigants of any given case, and equally important, the bar who must advise clients or litigants in situations yet to come, will know that in the absence of most compelling circumstances, the decision on identical questions, once made, will not be re-examined and re-decided merely because of a change in the composition of the Court or of the new panel hearing the case."[21]

The court of appeals below has ignored the principle of the law of the case. In doing so it is in direct conflict with the decisions of this Court, with the decisions of other courts of appeals, and even with its own decisions.[22] This is such a departure from the accepted and usual course of judicial proceedings that review by this Court—and, indeed, the exercise of this Court's power

[20] E.g., 13 regular and 4 senior judges in the Court of Appeals for the Fifth Circuit.

[21] Lincoln National Life Ins. Co. v. Roosth, 306 F. 2d 110, 114 (5th Cir. 1962) (en banc), cert. denied, 372 U. S. 912 (1963).

[22] See those cases cited, *supra*, in footnotes 16-18.

of supervision—is required. Supreme Court Rule 19 (1)(b).

Prayer

For the foregoing reasons, this petition for a writ of certiorari should be granted. The judgment of the court of appeals should be reversed and the case remanded to that court for disposition of the remaining issues.[23]

Respectfully submitted,

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[23] These issues are (i) whether the Union misrepresented insurance benefits as well as wages; and (ii) whether the Union effectively corrected *all* of its misrepresentations by announcement at an election-eve meeting, and distribution of a second leaflet just before the election, that its first leaflet was in error concerning the rates of "helpers" under the Houston contract. The Board first ruled against the Employer on both of these issues on the basis of its ex parte investigation (R. -Vol. I, 41, 82; App. C, *infra*, pp. C2-11). The first Fifth Circuit panel reversed and remanded the case for hearing on these issues (377 F. 2d 558) (App. C, *infra*, pp. C1). On remand, the Trial Examiner found in favor of the Employer on both issues (App. B, *infra*, pp. B35-39, 43-44), but the Board found contrary (App. B, *infra*, pp. B7-9). The Fifth Circuit panel in the second appeal did not reach either issue (App. B, *infra*, pp. B1-3).

Proof of Service

COUNTY OF DALLAS
STATE OF TEXAS

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared JERRY L. BUCHMEYER, who being by me duly sworn upon oath stated:

I, Jerry L. Buchmeyer, am not a member of the bar of Supreme Court of the United States; but I am a duly licensed and practicing attorney and a member of the State Bar of Texas and have been one of the attorneys of record for petitioner herein in all proceedings had in the court of appeals below.

I further state upon oath that upon the 31st day of March, 1969, I served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mailing copies of such Petition, properly addressed, with air mail postage prepaid, upon:

(i) the counsel for Respondent, National Labor Relations Board: Arnold Ordman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel; John D. Burgoyne, Corinna Lothar Metcalf, Attorneys; National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C.

(ii) the Solicitor General of the United States, U.S. Department of Justice, Washington 25, D.C.

Jerry L. Buchmeyer

Jerry L. Buchmeyer

SWORN TO AND SUBSCRIBED before me by the said Jerry L. Buchmeyer this the 31st day of March, 1969.

Betty Suther

Notary Public in and for Dallas County, Texas

Betty Suther
Notary Public, Dallas Co., Texas

APPENDIXES

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APPENDIX A

(Judgments Below)

1. *Judgment (Jan. 9, 1969):*

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 26,259

S. H. LYNCH AND COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: Tuttle and Gewin, Circuit Judges, and Pittman, District Judge.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of S. H. Lynch and Company, Inc. to review and set aside a certain supplemental order of the National Labor Relations Board issued against petitioner on June 14, 1968, and upon cross-application of the National Labor Relations Board to enforce said supplemental order. The Court heard argument of respective counsel on December 9, 1968, and has considered the briefs and the transcript filed in this cause. On December 19, 1968, the Court being fully advised in the pre-

mises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: JANUARY 9, 1969

2. ***Denial Petition for Rehearing:***

IN THE UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 26259

S. H. LYNCH AND COMPANY, INC.,
Petitioner-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
(and Reverse Title)
Respondent-Petitioner.

Petition for Review of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING EN BANC
(February 27, 1969)

Before TUTTLE and GEWIN, Circuit Judges, and PITTMAN, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B
(Opinions Below)

1. *Fifth Circuit Opinion:*

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 26259

S. H. LYNCH AND COMPANY, INC.,
Petitioner-Respondent,
versus
NATIONAL LABOR RELATIONS BOARD,
(and Reverse Title)
Respondent-Petitioner.

Petition for Review of an Order of the National Labor Relations Board (Texas Case)

(December 19, 1968)

Before TUTTLE and GEWIN, Circuit Judges, and PITTMAN, District Judge.

PER CURIAM: In this case the petitioner-company, S. H. Lynch & Company, Inc., requests the court to set aside the National Labor Relations Board's decision and order requiring the company generally to cease and desist from committing unfair labor practices and specifically to recognize and bargain with International Union of United Brewery, Flour, Cereal, Soft Drink

and Distillery Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees. The Board filed a cross-petition to enforce the order.[1] The company had refused to bargain with the union for the purpose of challenging the validity of a representation election during which the union made several misrepresentations to the employees.

The election was held between approximately 7:00 and 7:30 a.m. on Friday, November 19, 1965. A week before the election the union had mailed to the employees a leaflet entitled "It Does Not Cost — It Pays to Belong: Look at the Comparison and See for Yourself" which purported to compare the compensation and benefits received by the company's employees with those received by employees who were represented by the union. The leaflet was concededly false and misleading in several respects. The company became aware of the leaflet and the misrepresentations it contained sometime during the morning of Wednesday, November 17. However, the company made no effort whatever to correct or rebut the statements contained in the leaflet prior to the election.

On the basis of the Trial Examiner's findings, the Board concluded, among other things, that the company had had adequate time to answer the union's misrepresentations and, accordingly, refused to set aside the elec-

[1] This matter is before this court for the second time. The Board's original Decision and Order are reported at 160 N.L.R.B. 113. This court's opinion remanding the case to the Board is reported at 377 F. 2d 558 (5th Cir. 1967). The Board's Supplemental Decision and Order following the remand are reported at 171 N.L.R.B. No. 167.

tion. Our approach to Board determinations in the context of this case was succinctly stated in *Pepperell Mfg. Co. v. NLRB*, ... F. 2d ....., ... (5th Cir. 1968) [No. 24955, November 13, 1968]:

> The Board has wide discretion in its conduct and supervision of elections. Determination whether union representation election was fairly or unfairly conducted and should be set aside is primarily for the National Labor Relations Board. Thus, the only question presented to the Courts in an election review is whether the Board has reasonably exercised its discretion.

The Board's findings and conclusions being supported by substantial evidence on the record considered as a whole, the company's petition is denied and the cross-petition for enforcement is granted. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

ORDER ENFORCED.

2. *Board's Supplemental Decision and Order (June 14, 1968):*

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 16-CA-2618

S. H. LYNCH AND COMPANY, INC.,
Petitioner,

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On July 6, 1966, the National Labor Relations Board issued a Decision and Order[1] in this proceeding in which it found that Respondent had violated Section 8(a)(5) of the National Labor Relations Act, as amended, by refusing to recognize and bargain with the Union after it was certified by the Board, and ordered Respondent to take certain affirmative action designed to remedy the unfair labor practices. Thereafter, Respondent filed with the United States Court of Appeals for the Fifth Circuit its petition to review and set aside the Board's Order, and the General Counsel filed a cross-petition for enforcement of the Order. On June 8, 1967, the court rendered its Decision,[2] vacating the Board's Order and

[1] 160 NLRB 113.
[2] 377 F. 2d 558.

remanding the case to the Board to conduct a full hearing on the issues raised by Respondent's objections to the election conducted on November 19, 1965, without limiting the evidence by considerations of when discovered or whether previously available, and thereafter to determine under appropriate Board rules, regulations, and procedures the unfair labor practice charge. On July 24, 1967, the Board issued an Order reopening the record and directing a hearing before a trial examiner for a full hearing consistent with the court's decision.

On September 20, 1967, a hearing was held before Trial Examiner Max Rosenberg, and on November 20, 1967, he issued his Supplemental Decision, attached hereto, in which he found merit in Respondent's objections and recommended that the election be set aside and a new election directed. Thereafter, the Charging Party filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief, and Respondent filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member Panel.

The Board has reviewed the rulings of the Trial Examiner made at the reopened hearing and finds that no prejudicial error was committed. The rulings are

hereby affirmed. The Board has considered the Trial Examiner's Supplemental Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

As the Trial Examiner finds, there are three areas of alleged misrepresentation by the Union during its campaign, i.e., the wage rates of Respondent's own employees, the wage rates of union employees at other beer distributors' plants in Houston, and the comparison of insurance benefits then in force at Respondent's plant with those received by Houston employees.

First, the Union understated some of the wage rates of the very employees it was organizing. The Trial Examiner found that the subject of Respondent's own employees' wages had been the subject of campaign discussion for some weeks before the election, and that the employees were well aware of what they were receiving. He therefore concluded, and we agree, that the Union's understatements were of the type which the employees were capable of evaluating, and thus did not undermine the employees' freedom of choice in selecting a bargaining representative.

Secondly, the Union stated that Houston union "helpers" were receiving 4½ cents commission per case which, based on a week in which 1,000 cases were handled, and added to a base pay of $82, gave them a

weekly pay of $127, compared to a commission of only 2 cents per case at Respondent's plant. In fact, Houston helpers were receiving only 2 cents per case. This discrepancy was discovered by Respondent approximately 45 hours prior to the time set for balloting. At a pre-election conference the following morning, November 18, Respondent inquired of Gerchak if his facts were not wrong. Gerchak checked the Houston contract, and admitted that the commission rate was indeed 2 cents rather than 4½ cents. He offered to do whatever Respondent thought necessary to correct this, suggesting a joint leaflet, but Respondent declined on the grounds there was not enough time effectively to reach the employees. That night the Union had a meeting. Of the 61 unit employees, 35 to 40 were in attendance. The Union announced to all present that it had misstated the helpers' commission rate, and gave the correct rate. The following morning, November 19, for an hour preceding election time, 6 employees handed out a letter at the plant entrances which informed employees that, whereas it had been stated that Houston employees were receiving 4½ cents per case commission, in fact they were receiving only 2 cents.

The Trial Examiner found that this discrepancy was gross, that Respondent did not have sufficient time to reply effectively, and that, in the manner portrayed by the Union, it constituted a material misrepresentation which reasonably might be expected to have a signifi-

cant impact on the election. We disagree with his conclusion.

In the total circumstances surrounding the misrepresentation as to the per case commissions, it is our opinion that the Union not only did all that it possibly could to correct that misrepresentation, but in fact by its statements at the November 18 meeting and in its November 19 leaflet effectively dispelled any misleading effects the misrepresentation may otherwise have had on the voting. Unlike the Trial Examiner, we do not believe that this conclusion is foreclosed either by the absence of some eligible voters from the union meeting or by the fact that the handbilling the next day was curtailed before some employees were scheduled to report for work. In our opinion, the nature of the Union's efforts makes it reasonable to infer that an insignificant number of voters, if any, were not apprised of the Union's misstatement before casting their ballots.

Finally, with regard to insurance, the Union's leaflet stated that Respondent's program cost each employee $11.50 per month, whereas the insurance in force for Houston employees was "all paid for by the Company." While in fact this was true, the Employer argues that this statement is grossly misleading and was calculated to mislead the employees because it implies that Houston gets for nothing what costs the Employer's employees $11.50, where the "free" insurance coverage in Houston was substantially less in scope and amount.

The differences in coverage are set forth by the Trial Examiner. He finds the differences to be glaring, the statements of the Union to be half true at best, and a material misrepresentation that might have impeded the employees' right freely to select or reject a bargaining representative. We do not agree.

What the Union stated in its leaflet was true. Houston employees were receiving insurance benefits fully paid for by their employers. The Union did not state what the terms of Respondent's policy were; it did not state that Houston employees were receiving the same insurance benefits; it made no representations whatever with regard to the scope or quality of either policy. As the Trial Examiner found, the statements necessarily invited comparison, and we agree that employees would question the coverage of the respective insurance programs. However, we see nothing in the statements that would lead employees to assume, rather than inquire as to whether, the Houston insurance benefits equalled those of Respondent. In these circumstances, we cannot find that the leaflet's failure to disclose coverage discrepancies constituted a concealment of fact so material as to invalidate the election, or that the statement in the leaflet reasonably conveyed any impression that the Houston insurance program was as comprehensive as that of Respondent.

Furthermore, we believe that in the circumstances of this case Respondent did have adequate time to answer the Union's representations as to wage rates and

insurance. It was satisfied on November 17 that "gross" misrepresentations had been made as to each. It did not communicate with the Union on this matter until November 18, and then, as the testimony of Respondent witness Buchmeyer as well as Union witness Gerchak shows, the Union was informed only of the discrepancy as to the 2 versus 4½ cents per case. The Union offered to do whatever was suggested in order to correct this, but Respondent repeatedly stated there was not enough time. This is not the same as a case where an employer discovers shortly before an election that some misrepresentation has been made, but hasn't time to fathom the precise nature of the misrepresentations and/or has not available to it the facts with which to refute the misrepresentation. On November 17, Respondent had all the facts. It had a copy of the Houston contract from which the facts were drawn, and had drawn its conclusions even as to why it felt that the misrepresentations as to insurance coverage (discussed above) were false and misleading. Under the circumstances, we are not persuaded that Respondent at that time had insufficient opportunity for communicating with employees in a manner that would remove effectively any confusion among the 61 unit employees that might have been attributable to the Union's statements.[8]

[8] The Trial Examiner states that under the Board's rule in *Peerless Plywood Company*, 107 NLRB 427, "Respondent was prohibited from assembling its employees, if it indeed could, and delivering a corrective speech to them *during the day* * * *." (Emphasis supplied.) We wish to make it clear that the *Peerless Plywood* rule prohibits such electioneering within 24 hours of a scheduled voting time only if done *on company time.*

On the basis of the above findings, and the entire record, we conclude that the Respondent's objections to the election were without merit, and we hereby overrule them. We find that the certification issued by the Board was therefore valid, that the Union has, since March 7, 1966, been the exclusive bargaining representative of the employees in the appropriate unit set forth below, and that Respondent, by refusing to bargain collectively with the Union on or about March 14, 1966, and at all times thereafter, violated Section 8(a) (5) and (1) of the Act.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth above, occurring in connection with its operations described in the appropriate unit, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a) (5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understand-

ing is reached, embody such understanding in a signed agreement.

Conclusions of Law

1. S. H. Lynch and Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All route salesmen, helpers, contract salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaner, but excluding guards, office clerical employees, watchmen, mechanics, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. On March 7, 1966, and at all times thereafter, the above-named labor organization was and has been the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 14, 1966, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respon-

dent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, S. H. Lynch and Company, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, as the exclusive and duly certified

bargaining representative of its employees in the following appropriate unit:

> All route salesmen, helpers, contact salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaners, but excluding guards, office clerical employees, watchmen, mechanics, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Dallas, Texas, plant, copies of the attached notice marked "Appendix".[1] Copies of said notice, on forms provided by the Regional Director for Region 16, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by

[1] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order", the words "a Decree of the United States Court of Appeals Enforcing an Order."

it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 16, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C.
June 14, 1968

John H. Fanning, *Member*

Gerald A. Brown, *Member*

Sam Zagoria, *Member*

National Labor Relations Board

[SEAL]

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Rela-

tions Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All route salesmen, helpers, contact salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaners, but excluding guards, office clerical employees, watchmen, mechanics, and supervisors as defined in the Act.

S. H. LYNCH AND COMPANY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 8A24 Federal Office Building, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 334-3921.

3. *Trial Examiner's Supplemental Decision (Nov. 20, 1967):*

United States of America

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

S. H. LYNCH AND COMPANY, INC.

and

Case No. 16—CA—2618

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO

James O. Dodson, Esq., of Fort Worth, Tex., for the General Counsel.

Herbert M. Berman, Esq., of Cincinnati, Ohio, and *Edwin S. Gerchak*, International Representative, of Stuttgart, Ark., for the Charging Party.

Fritz Lyne, Esq. (Lyne, Klein & French), of Dallas, Tex., and *Jerry Buchmeyer, Esq. (Thompson, Knight, Simmons & Bullion)*, of Dallas, Tex., for the Respondent.

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

Statement of the Case

MAX ROSENBERG, Trial Examiner: Pursuant to a Stipulation for Certification Upon Consent Election

approved by the National Labor Relations Board's Regional Director for Region 16 on November 1, 1965, an election by secret ballot was conducted on November 19, 1965, among Respondent's route salesmen, helpers, contact salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaner at its installation in Dallas, Texas.[1] Of approximately 61 eligible voters, 38 cast valid votes for, and 22 cast valid votes against, the petitioning union, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, herein called the Union. On November 23, 1965, Respondent filed timely objections to the election. In these objections, Respondent alleged that, less than 2 days before the balloting, Respondent learned that the Union had distributed a leaflet to its employees which purported to compare the wage and fringe benefits provided under a contract which the Union had negotiated with other beer distributing companies in Houston, Texas, with the wage and fringe benefits then afforded by Respondent. The objections further asserted that this leaflet misstated the facts and gave a misleading and distorted comparison by exaggerating purported wage rates and insurance benefits conferred by the Houston agreement, and by grossly understating certain of the existing wage rates and insurance benefits granted to Respondent's employees. Specifically, the objections set forth approximately

[1]Case 16—RC—4095. Respondent is engaged in the warehousing and distribution of Schlitz beer and maintains its place of business in Dallas, Texas, as the Board has heretofore found. *S. H. Lynch and Company, Inc.*, 160 NLRB No. 8.

10 asserted instances of false and misleading representations by the Union concerning matters about which the employees possessed no independent knowledge sufficient to enable them to recognize and properly evaluate the information, averred that the Respondent had been precluded by time considerations from verifying the misstatements and from making any effective reply to the employees concerning them prior to the election; and prayed that the election be set aside for these reasons and that a new election be conducted.

Following the filing of the objections, the Regional Director undertook an investigation thereof and, on January 12, 1966, issued his report on objections. In that report, the Director, without holding a hearing on the objections, concluded that Respondent had ample opportunity in advance of the election to correct any "false information" disseminated by the Union but declined to do so; that the Union had made a timely, albeit "last-minute," attempt to correct the misrepresentations contained in its leaflet; that the employees were aware of their remuneration and other benefits and therefore were capable of evaluating the comparisons made by the Union; and that the election should not be rescheduled. The Director therefore recommended that the Union be certified as the collective-bargaining representative of the employees involved. Thereafter, Respondent filed timely exceptions to the Director's report. In these pleadings, Respondent contended that substantial and material issues of fact ex-

isted concerning the Union's preelection misrepresentations and understatements, as well as Respondent's opportunity effectively to rebut them, and that it should have been afforded a hearing on these issues. On May 7, 1966, after considering the Respondent's objections, the Director's report, and Respondent's exceptions thereto, the Board issued a Certification of Representative pursuant to which the Union was adjudged the exclusive bargaining agent of the employees in the appropriate unit.

In the meantime, and on March 7, 1966, the Union filed charges with the Board alleging that Respondent had refused to bargain with the former in derogation of the obligations imposed under Section 8(a) (5) of the Act.[2] By stipulation dated April 13, 1966, the parties submitted the unfair labor practice case directly to the Board on an agree-upon record,[3] for findings of fact, conclusions of law, and a Decision and Order, waiving a hearing before a Trial Examiner.[4] In a Decision and Order dated July 6, 1966,[5] the Board, after making various subsidiary findings with respect to jurisdiction and the status of the Union as a labor organization within the purview of the Act and following a review of the

[2]Case 16—CA—2618.

[3]Comprising the charge, the complaint and notice of hearing, the answer to the complaint, and the entire record in Case 16—RC—4095.

[4]The parties stipulated that, on March 8, 1966, the Union requested Respondent to bargain and that on March 14, 1966, Respondent declined to do so in order to obtain judicial review of the Board's decision overruling Respondent's objections to the election and the certification of the Union.

[5]160 NLRB No. 8.

record in the prior representation proceeding, found that the Union had been duly certified in an appropriate unit of employees at Respondent's installation and that Respondent had unlawfully refused to bargain with the Union concerning those employees.

On July 27, 1966, Respondent filed a petition to review and set aside the Board's Decision and Order with the United States Court of Appeals for the Fifth Circuit, and the General Counsel cross-petitioned to enforce said Order. In an opinion rendered on June 8, 1967,[6] the court vacated the Order and remanded the case for a hearing on Respondent's objections to the election, citing as authority therefore its decision in *U. S. Rubber Co. v. N.L.R.B.*[7] By order of July 24, 1967, the Board decided to accept the remand and directed that a further hearing be held in the complaint proceeding consistent with the remand, and that such hearing be conducted before a Trial Examiner to be duly designated by the Chief Trial Examiner. It also directed that, upon the conclusion of the trial, the presiding Trial Examiner prepare and serve upon the parties a decision containing findings of fact upon the evidence received, conclusions of law, and pertinent recommendations.

[6] 377 F. 2d 558 (C.A. 5).

[7] 373 F. 2d 602 (C.A. 5). In that decision, the Court stated that "In the representation proceeding it [the Board] should not have ruled on the employer's objections to the election without a hearing, for there were substantial and material issues which could be determined properly only by a hearing." at 604. The objections in that case alleged that the union, within 24 hours prior to a scheduled election, had made a false comparison between wages and fringe benefits paid by the employer and those afforded by other companies.

With all parties represented, this proceeding was heard before me in Dallas, Texas, on September 20, 1967. All parties were afforded full opportunity to present evidence, to examine and cross-examine witnesses, to argue orally at the close of the hearing, and to file briefs. Oral argument was waived by all parties. Briefs have been received from the Respondent and the Union which have been duly considered.

Upon consideration of the entire record, including the briefs filed with me, and upon my observation of the demeanor of each witness while testifying, I make the following:

Findings of Fact

The facts adduced before me are not in dispute and I find them to be as follows:

Pursuant to the Stipulation for Certification Upon Consent Election previously adverted to, an election was conducted at the Respondent's plant between 7 and 7:30 a.m. on November 19, 1965. In anticipation of the election, and on November 12, 1965, the Union mailed a leaflet to each employee in the bargaining unit entitled "It Does Not Cost—It Pays to Belong: Look at the Comparison and See for Yourself." This leaflet, which was drafted and signed by Union International Representative Edward Gerchak, purported to contrast the wages and fringe insurance benefits provided under a contract between the Union and several beer distributors in Houston, Texas, with those afforded

by Respondent to its unrepresented employees in Dallas. The leaflet contained the following:

Houston Union Member [*Houston Contract*]		*Dallas Non-Union Schlitz Employee* [*Respondent's employees*]
	BOTTLE ROUTES	
$52.65	Weekly Base Pay	$35.00
7½ Cents	Commission per Case	4½ Cents
	Using 1000 Cases for Example	
$127.65	Total Weekly Pay	$80.00
	KEGMEN	
$95.04	A Week	$85.00 to $115.00
25 cents per half	Commission	None
	Using 150 Halves. For Example	
$132.50	Total Pay	$85.00 to $115.00

Helper on all Trucks in Houston Selling Over 500 Cases a Week

	HELPER RATES	
$82.00	Base Pay	$40.00
4½ Cents	Commission Per Case	2 Cents
	Using 1000 Cases For Example	
$127.00	Total Pay	$60.00
	WAREHOUSEMAN	
	Total Weekly Pay—	
$2.71 per hour	40 Hours	$1.25 to $1.75/Hr.
$108.40	Without Overtime	$50.00 to $73.00
8	Paid Holidays	3 Maximum
	INSURANCE	
All paid for by the Company		It Costs You As Much As $11.50 a Month

At 9:30 p.m. on Wednesday, November 17, 1966, Charles C. Crumpley, manager of Respondent's beer department, observed the union leaflet on his office desk which had been sent to him by a competitor. After reading the document, Crumpley delivered it to S. H. Lynch, Respondent's president, who in turn placed it on the desk of James A. Tyler, Jr., Respondent's secretary-treasurer. Tyler was out of his office at the time, but when Tyler returned, which was between 10 and 10:30 a.m., he discovered the leaflet, read it, and decided to compare its contents with a copy of the Union's Houston contract which had come into his possession in late October 1966. After reading both documents, Tyler noticed that the leaflet misrepresented the wages paid to helpers under the Houston contract by stating that these helpers received a 2½-cent-per-case commission more than Respondent's helpers received; misrepresented the total weekly pay for Houston helpers at $127 when, in fact, the Houston contract provided for only $102 per week for this job classification; understated the wages paid to Respondent's helpers, as well as the wages paid to Respondent's "bottle route" drivers; and misrepresented the insurance benefits afforded by Respondent. After discovering these misrepresentations and understatements, Tyler brought them to the attention of Lynch at 11 a.m. and they jointly decided to consult with counsel. Lynch and Tyler then contacted Attorney Jerry L. Buchmeyer, and explained the situation. Counsel advised that he needed time to

study and appraise the leaflet and the Houston agreement, and he scheduled a meeting with his clients for Thursday morning, November 18, 1966. Tyler testified that no attempt was made to notify the employees of any misstatements and understatements at this time.[8] In this connection, Tyler also testified that the drivers and helpers, who comprise 46 of the 61 employees in the unit, normally report for work between 7 and 7:45 a.m., make their deliveries, return to the plant anywhere between 11 a.m. and 4 p.m., and then check out.[9]

Lynch and Tyler met with Attorney Buchmeyer on the morning of November 18, 1966, and the discrepancies set forth in the leaflet as opposed to the Houston contract and Respondent's group insurance plan were explored. As a result of their discussions, and after considering the feasibilty and efficacy of notifying the men of the Union's misrepresentations by telegram, leaflet, letter, or the posting of a notice on the bulletin board, Attorney Buchmeyer reached the conclusion that "it was too late to effectively communicate with anybody."

At 4 p.m. on the afternoon of November 18, a preelection conference was convened by a Board agent with Attorney Buchmeyer, Lynch, Tyler, and Crump-

[8]Tyler testified without contradiction that, had Respondent posted a notice on the bulletin board correcting the Union's misrepresentations on the afternoon of November 17, "it wouldn't be noticed" by the employees.

[9]It is also Tyler's undenied testimony that Wednesdays constitute the lightest business day in the week. Accordingly, the drivers and helpers would be expected to return to the plant earlier. It should be noted that November 17, the date on which Tyler, Lynch, and Crumpley received the leaflet, fell on a Wednesday.

ley representing the Respondent, and International Representative Gerchak appearing on behalf of the Union. Before the conference commenced, Attorney Buchmeyer spoke to Gerchak and mentioned that the former had noticed a discrepancy between the per-case commission paid to Houston helpers as reflected in the Union's leaflet and that which appeared in the Houston contract. Attorney Buchmeyer inquired whether the Houston contract had been amended since its execution so that the leaflet correctly set forth the commission rate. After reviewing the contract, Gerchak readily confessed that the leaflet was in error and that the helpers covered by the Houston agreement were not receiving a greater commission than Respondent's men, and that the total weekly wage of the Houston helpers was accordingly miscalculated. During the preelection conference, Gerchak requested a private audience with the Board agent, and together, they left the room. Upon their return, Gerchak asked Buchmeyer what Respondent's position was with respect to the inaccuracy concerning the helpers' commission rate and weekly wage, and Gerchak suggested that both the Union and the Respondent draft and disseminate a joint leaflet or letter to the employees explaining the inaccuracies which appeared in the original leaflet. Buchmeyer requested time to confer with his clients and, after their private discussion, Buchmeyer informed Gerchak that "we hadn't had a chance to fully assess our position. We weren't going to waive any of the rights that we had. We did not think a letter or a telegram

or a leaflet, for that matter, would be effective at this date." Gerchak then suggested that the election be postponed so that the Union and the Respondent could apprise the employees of the inaccuracies in the union leaflet, and Buchmeyer agreed to a postponement. The Board agent was informed of the request for a postponement, and he thereupon telephoned his superiors for their approval. However, and according to Gerchak's testimony, the agent was instructed that "even with the parties' consent the election would not be postponed; that it would proceed as scheduled the next morning. That if any party had an objection to the election it could be filed and it would be heard in due course." After the mechanical details for the conduct of the election were ironed out, the conference ended.

Immediately thereafter, Gerchak took steps to correct the misstatement regarding helpers' commissions and weekly wages which appeared in the leaflet. Gerchak arranged for the production of another leaflet addressed to all of Respondent's employees, which recited that "In my letter to you in which I compared the Houston rates against those being paid to the Schlitz employees here [at nonunion companies in Dallas], I stated that the rate for 'helper' in Houston was $82 a week, base pay, and 4½ cents a case commission. The actual rate being paid in Houston is $82 a week and 2 cents a case commission." This leaflet contained Gerchak's signature and his union designation. However, no corrective mention was made in this document of

any other item contained in the original leaflet. At a union meeting which had previously been scheduled for the evening of November 18, Gerchak informed an assemblage of between 35 and 40 employees (out of a unit of 61) of the actual figures paid to helpers covered by the Houston contract but made no reference to insurance benefits. In Gerchak's words, he told the employees "during the course of my talk to them . . . that the Company attorney had called to my attention an error . . . and that the rate paid to the Houston employees was wrong, and that the actual rate of pay on commission was 2 cents a case."[10] Following his comments, Gerchak solicited volunteers from among the men in attendance to distribute the more truthful explanatory leaflet to employees as they reported for work on the following morning. At 6 a.m. on November 19, Gerchak and the six employees whom he had impressed into service stationed themselves at the plant entrances and distributed the leaflets to the employees who entered. At 7 a.m., the hour for the scheduled election, the handbilling ceased. As heretofore indicated, 46 of the 61 employees in the unit were classified as truckdrivers or helpers who normally reported for work betwen 7 and 7:45 a.m. each day. However, there is nothing in the record to indicate whether the remaining

[10]On November 29, 1965, 10 days after the election, the Union distributed a new leaflet to employees of other nonunion beer distributors in Dallas whose employees it had undertaken to organize. In this leaflet, the Union corrected its earlier misrepresentations concerning helpers' pay. With respect to insurance, the Union modified its earlier language relating to the Houston insurance benefits by stating "All paid for by the Company—Schlitz claims theirs is better."

employees reported for duty at the same time or at an earlier hour. Rounding out the evidence, Gerchak testified that he obtained information concerning wages which Respondent paid to its employees from the employees themselves. Tyler admitted that he informed each employee at the time of their hire what their wages, commissions, and incentive pay would be, and that "it is pretty common knowledge" as to what the employees "wages and pay is."

As chronicled above, the Union won the election by a vote of 38 to 22. Thereafter, Respondent's objections were filed to the election which triggered the instant litigation.

Conclusions

In *Hollywood Ceramics Company, Inc.*,[11] the Board, in defining its rules for determining whether the integrity of a representation election had been so impaired that it should be set aside, observed:

> The basic policy underlying [these rules], as well as the other rules in this election field, is to assure the employees full and complete freedom of choice in selecting a bargaining representative. The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of the employees. One of the factors which may so disturb these conditions as to interfere with the expression of this free choice is gross misrepresentation about some material issue in the election. It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires,

[11] 140 NLRB 221.

> and they have not exercised the kind of choice envisaged by the Act. For this reason, the Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted.[12]

That tribunal then restated the rules regarding misrepresentations made by parties prior to an election:

> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.[13]

In its decision in that case, the Board found that the participating union had misstated the wages paid to employees at other plants with those received at the participting employer's operation, that wage rates constituted "a matter of utmost concern to the employees," and that the misstatements conveyed "a substantially erroneous picture of the comparative wage situation."[14]

In the instant proceeding, it appears from the record before me that both the Regional Director and the Board deemed the Union's claim that Houston helpers

[12] *Id.* at 223.
[13] *Id.* at 224.
[14] *Id.* at 225.

received a commission which was 2½ cents per-case greater than that accorded Respondent's helpers, and that the former earned a weekly wage of $127 compared to the $60 afforded to Respondent's men when in fact the Houston helpers earned the same commission as Respondent's men and were paid only $102 weekly, as a gross and false misrepresentation. I glean this from the Director's characterization of this claim as "false information" in his report on objections, and the Board's subsequent adoption of the report. However, even apart from these considerations, I am convinced that the Union, having been a co-author of the Houston contract, possessed a special knowledge of the per-case commission rates afforded under that agreement as well as the weekly rates paid to the Houston helpers, a knowledge which was not readily available to Respondent's employees. I conclude that the comparison of those rates, in the manner portrayed by the Union, with Respondent's rates, constituted a material misrepresentation (a difference of more than 100 percent) which reasonably might be expected to have a significant impact on the election conducted on November 19, 1966.[15]

[15]See *Hollywood Ceramics Company, Inc.*, 140 NLRB 221. See also *N.L.R.B. v. Houston Chronicle Publishing Company*, 300 F. 2d 273, 280 (C.A. 5): "Purportedly authoritative and truthful assertions concerning wages and pensions of the character of those made in this case are not mere prattle; they are the staff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain."

The Union appears to claim that these misrepresentations were the product of inadvertence. However, it is immaterial for the purposes of decision whether they were deliberately made or not. See *Hollywood Ceramics Company, Inc.*, and *N.L.R.B. v. Houston Chronicle Publishing Company, supra.*

The Union's understatement of the wages which Respondent's employees received is of a different breed, however. The Union's leaflet stated that the weekly base pay for Respondent's helpers was $40 when in fact it was $45; that these helpers were paid a 2 cents per-case commission when in fact the commission ranged from 1½ to 3½ cents in addition to an extra commission of 20 percent based on a graduated scale; that the weekly base pay of $35 for bottle route drivers as set forth in the leaflet failed to show that such employees were actually paid from $35 to $55 per week depending on length of service with Respondent; that bottle route drivers were afforded a commission of 4½ cents per-case when in reality the commission amounted to 5½ cents for quart containers and 4½ cents for all others; that these drivers received weekly wages and commissions of $80 when in fact they were additionally afforded a monthly incentive pay ranging from $15 to $150; and the leaflet failed to state that helpers received incentive pay each month up to $75 which had the effect of escalating their weekly base rate. In his report on objections, the Regional Director found that these wage and commission matters were not within the pecular knowledge of the Union; that S. H. Lynch, Respondent's president, delivered a speech to his employees on November 4, 1966, some 2 weeks before the elec-

tion, in which he touched on these subjects,[16] and, that the employees themselves were aware of their remuneration. Consequently, he found that the employees were capable of evaluating this information and concluded that these representations did not impinge upon the regularity of the election.

I have heretofore found, based upon the uncontroverted testimony of Respondent Secretary-Treasurer Tyler, that each employee was informed of his wage rate, commissions, and incentive pay on the date of his hire, and that these items were of "pretty common knowledge" at the plant. Indeed, Lynch himself expanded on the incentive program when he addressed his employees at the plant on November 4, 1966. Surely, if anyone knew what the wages, commissions, and incentives afforded to Respondent's employees were, it was the employees themselves, for not only had they been informed by Respondent about these items, but they were the ones who actually received the remuneration. Having obtained the Union's leaflet on November 12, 1966, a week prior to the election, the employees had ample time in which to assay the wage data contained therein against their pocketbook or by consultation with their employer. This is not a case where "the promulgating party [the Union] had special knowledge of the facts asserted, thus making

[16] In that speech, Lynch is admittedly quoted as having said: "Monthly incentive programs based on quota—In addition to the regular salary and commission the company provides maximum of $150.00 per mo. bonus on Schlitz—$20.00 per month bonus on Old Milwaukee—For our driver salesmen and ½ of the amount they earn goes to their helper—This applies to package routes—Draft beer routes maximum $150.00 per mo. based on quota."

it more likely that the employees would rely on them;"[17] for International Representative Gerchak testified without contradiction that he obtained the wage information from the employees. Accepting this testimony, as I do, it seems clear that the employees would not have relied upon Gerchak's recitation of Respondent's monetary benefits in total disregard of their more personal and superior knowledge. Accordingly, I conclude that the Union's understanding of the wages, commissions, and incentive pay which Respondent's employees assertedly received did not undermine the employees' full and complete freedom of choice in selecting a bargaining representative.

Turning to the Union's insurance claim, the leaflet represented that the employees covered by the Houston contract received insurance benefits which were "All paid for by the Company," whereas the Respondent's companion benefits were portrayed as costing "As Much As $11.50 a Month." Respondent argues that, because its program of insurance contained much broader coverage than that offered under the Houston agreement, the foregoing quotation in the leaflet constituted a false representation that the benefits under the Houston agreement were equivalent in scope and amount to those provided by Respondent, and that the necessary and inescapable inference from this comparison was that Respondent's employees were paying $11.50 per month for the same insurance benefits which the Houston

[17] See *N.L.R.B. v. Houston Chronicle Publishing Company, supra,* at 278.

members obtained without charge. In terms of dollars and cents, Respondent's employees were indeed assessed the amount stated in the Union's leaflet for insurance protection, while the Houston employees paid nothing for their coverage. However, the record clearly shows that Respondent provided major medical coverage for employees in the sum of $10,000, whereas the Houston employees received none; that Respondent's employees were afforded life insurance coverage in the amount of $5,000 for each employee whose term of employment was 10 years or longer and $2,000 for all others with lesser tenure, while all Houston employees received only a $2,000 policy regardless of length of service; that hospitalization benefits provided by Respondent amounted to $15 per day for room and $300 for extras, whereas the Houston personnel received $12 and $200, respectively; that surgical benefits under Respondent's program totaled $300 for employees and $300 for their dependents, yet the Houston members only obtained coverage in the amount of $250 and $200, respectively; and that Respondent, through self-insurance, offered accident and health benefits under which it paid its employees the full amount of their wages and commissions during periods of illness or injury, while the Houston employees received only $30 per week for 13 weeks.

In its objection relating to the Union's statements in the leaflet concerning insurance, Respondent provided the Regional Director with the foregoing information. In disposing of this objection, the Regional Director

concluded in his report that "Since the employer has submitted no evidence that the union attempted to compare insurance benefits or coverage during the campaign, it is recommended that this part of the Employer's objections be overruled." It would seem to this Trial Examiner that a statement to the effect that employees of employer "X" pay $11.50 for insurance coverage, whereas the employees of employer "Y" pay nothing at all, necessarily invites comparison of the benefits offered by each. The ordinary worker, to whom insurance is a vital factor in his employment relationship, is just as much concerned about his coverage as he is with the cost of participation in a program.[18] In the context of an election campaign, where a labor union seeks to enlist the collective support of employees by deprecating the amount of benefits which their employer afforded (as did the Union in its leaflet regarding wage rates), it is only logical to infer that the average employee, when told that he is being required by his employer to pay for insurance while his unionized counterpart at another plant receives insurance gratis, would reasonably be led to believe that the benefits at both installations were identical. Although Respondent's employees were aware of the terms, of their group insurance plan, so far as this record stands, only the Union knew of the scope and coverage of the plan created under the Houston contract, and the discrepancies between the benefits provided under each which were, to say the least, glaring. It is true that, superficially, all

[18] See *N.L.R.B. v. Bata Shoe Company*, 377 F. 2d 821 (C.A. 4).

that the Union's leaflet contained was a statement that Houston employees paid no insurance premiums while Respondent's employees did. But this was only a half truth. As the court observed in *N.L.R.B. v. Trancoa Chemical Corporation.*[19] "A half truth means a half lie, and a half lie may be, or may not be, a substantial misrepresentation." That even the Union recognized its deception in this regard is reflected in the wording of the leaflet which it subsequently distributed to other nonunion employees in the Dallas plant. For, in addition to the phrase "All paid for by the Company" with reference to the Houston insurance benefits, the Union judiciously added the phrase "Schlitz [nonunion employers] claims theirs is better."

After a careful review of the evidence presented on this issue, I am persuaded and conclude that the Union's reference to insurance in its campaign leaflet caused the employees to believe that they were being assessed $11.50 per month by Respondent for the same insurance benefits which the Union had obtained for its Houston members at no charge; that, in fact, Respondent's insurance coverage was far superior to that which obtained under the Houston contract; that Respondent's employees possessed no special knowledge of the terms of the Houston insurance plan with which to evaluate the Union's propaganda; that the representation relating to insurance constituted a gross subversion of the truth; and that the Union's claim amounted to

[19] 303 F. 2d 456, 459, footnote 3.

a material misrepresentation which might have misrepresentation which might have impeded the employees' right freely to select or reject a bargaining representative.[20]

I have heretofore concluded that, prior to the election, the Union grossly misrepresented the weekly rates and commissions which Respondent's helpers received as opposed to those paid to helpers covered by the Houston agreement, and that the Union similarly misrepresented the companion insurance benefits. In his report on objections, the Regional Director found, at least with respect to the misrepresented wage and commission rates paid to helpers, that Respondent had ample time before the balloting to make an effective reply to the Union's false assertions but declined or failed to do so. On the basis of the entire record made in this proceeding, I am constrained to disagree.

The undisputed testimony shows that Respondent first learned of the contents of the Union's leaflet at 9:30 a.m. on November 17, 1966, less than 2 days before the scheduled election, when Crumpley found it lying on his desk. After perusing the document, Crumpley gave it to Lynch who in turn delivered it to Tyler for more thorough study. Tyler sat down and commenced

[20] See *N.L.R.B. v. Trancoa Chemical Corporation*, 303 F. 2d 456, 461 (C.A. 1): "We are not clear whether the Board's expression 'preclude * * * freedom of choice' means that the burden is upon the respondent to show that the employees were necessarily misled, or only that it is sufficiently likely that it cannot be told whether they were or were not. The latter is the appropriate rule. *N.L.R.B. v. Trinity Steel Co.* 5 Cir., 1954, 214 F. 2d 120."

to make a comparison between the information outlined in the leaflet and the information set forth in the Houston contract and, by 11 a.m., he reported his preliminary findings to Lynch. Sometime later that day, Respondent's officials considered the situation serious enough to consult with counsel, and the advice of Attorney Buchmeyer was sought. Because of his apparent unfamiliarity with the leaflet, as well as the Houston agreement and Respondent's group insurance plan, counsel deferred meeting with his clients until Thursday morning, November 18, in order to review and compare the documents then in their possession. On the morning of November 18, Buchmeyer met with Lynch, Tyler, and Crumpley and, after a further review of the leaflet and the corresponding documents, they arrived at a consensus that the leaflet grossly misrepresented wages and insurance benefits. These men thereupon turned to a consideration of how best they could communicate with the employees to correct the misrepresentations. After assessing the potential effectiveness of sending letters, telegrams, or leaflets to the employees, or of the posting of a notice on the plant bulletin board, Buchmeyer reached the conclusion that he could not effectively reach all of the electorate through these media at this late date.

Under the Board's rules governing misrepresentations as elaborated in *Hollywood Ceramics*,[21] a party must not be prevented from making a timely, "effective re-

[21] See footnote 13, *supra*.

ply" to such misrepresentations if the results of an election are to stand. When Respondent received the Union's leaflet on November 17, 1966, there remained less than 48 hours before the balloting was to commence. The Union's leaflet contained a number of representations regarding wage rates paid to bottle route drivers, kegmen, helpers, and warehousemen, as well as overtime, holidays, and insurance benefits. It is apparent on the record that Tyler, Lynch, and Crumpley spent considerable time on November 17 comparing the Union's leaflet with the Houston contract and Respondent's insurance plan. Having come up with a myriad of representations which they believed to be false, these officials took the reasonable and practical approach and contacted their labor relations counsel to ascertain what course of action they could or should pursue. At this juncture, time was, to be sure, of the essence. However, Respondent was entitled to seek the best advice that it could lest, through haste, it too might be charged with misrepresentations in its rebuttal. Respondent's action in notifying counsel was speedily taken, and a meeting between attorney and client was scheduled at the earliest opportunity consistent with the needs of counsel to study the pertinent documents. Accordingly, I am unable to conclude that Respondent deliberately or unreasonably dragged its feet on November 17 in rebutting the Union's false assertions. Nevertheless, even were I to assume that Respondent's officials were pos-

sessed of sufficient information on that day to challenge the Union's misrepresentations, I am not convinced that they could have effectively communicated their views to the employees prior to the election. Any reply, of necessity, would have had to be carefully formulated and drafted, and by the time this was accomplished, most of the drivers and helpers, who constituted the bulk of the employment complement, might have already left work on Wednesday inasmuch as Tyler testified without contradiction that Wednesday was a light delivery day with the result that these employees would have left the plant early. Furthermore, Tyler also testified that a posted notice would have been to no avail because it would not likely have come to the attention of the men. Letters might have been posted to the employees that afternoon or evening, but there is no assurance that these missiles would have reached all employees before 7 a.m. on November 19, the hour set for the election. To be sure, Respondent might have dispatched telegrams to the men, but in view of the obvious length that these dispatches would have assumed and the number of individuals to whom they would have been sent (61), the cost of this mode of communication might well have been prohibitive.

Nor would Respondent have been in any better position to reply when its officials met with counsel on the morning of November 18 and confirmed the extent of the Union's misrepresentations. Under the Board's

Peerless Plywood rule,[22] Respondent was prohibited from assembling its employees, if it indeed could, and delivering a corrective speech to them during the day inasmuch as all electioneering of this nature is proscribed under that rule. Furthermore, it is less likely that the employees would have timely received a letter of rebuttal if mailed to them on November 18. Moreover, the distribution of leaflets, the posting of notices, or the dispatch of telegrams, would have been as futile or expensive on November 18 as on November 17.

Following the preelection conference on November 18, International Representative Gerchak drafted a leaflet setting the record straight as to the wages and commissions paid to helpers, announced the correction at a union meeting held that evening, and distributed the leaflets on the morning of the election at the entrances to the plant. I am not persuaded that these activities effectively righted the Union's misdeeds. Apart from the fact that the leaflet and the announcement corrected only the misrepresentations relating to the wages and commissions and did not encompass the misrepresentations regarding the insurance items, which I have heretofore found, the record shows that slightly more than a half of the employees in the voting unit at-

[22] *Peerless Plywood Company*, 107 NLRB 427. "Accordingly, we now establish an election rule which will be applied in all election cases. This rule shall be that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed." at 429.

tended the union meeting. Moreover, by Gerchak's own admission, employees who might have reported for work prior to 6 a.m. on November 19 would not have received the Union's corrective leaflet. Accordingly, I find and conclude that Respondent did not have sufficient time prior to the conduct of the election to make an effective reply to the Union's misrepresentations concerning wages and insurance benefits, and that the Union's actions on the evening of November 18 and the morning of November 19 were ineffectual and conclusively to remove its material misrepresentations from the minds of the voteds.

This is a case in which the administrative process unfortunately broke down. When the parties met with the Board agent at the preelection conference on November 18, Gerchak was quick to confess that the Union had grossly misrepresented the helpers' wages and commissions and readily realized that Respondent was barred from effectively reaching its employees with its version of the facts because of time considerations. Gerchak himself suggested that the election might be postponed so that both adversaries could fully and truthfully apprise the employees of the correct facts, and Attorney Buchmeyer agreed that this was the most salutary way in which to resolve the issue if a fair and free election was to be had. When the matter of postponing the election was presented to the Board's Regional Director, the request was denied because, in his view, it was designed to obtain "additional time for

electioneering." For want of a few days delay, 2 years of litigation has followed.

I have heretofore concluded that, less than 2 days before the election, the Union grossly represented to the employees in the appropriate unit the wages and commissions paid to helpers covered under the Houston contract as opposed to those paid to Respondent's helpers and grossly misrepresented the insurance benefits which flowed to employees covered by that agreement in contract to the companion benefits received by Respondent's men. I have also found that the Respondent was prevented from making an effective reply in rebuttal to these misrepresentations because of their timing in relation to the election, and that the Union did not effectively retract its falsehoods before the balloting began. I shall therefore recommend that Respondent's objections to the election which relate to those misrepresentations be sustained, that said election be set aside, and that a second election be conducted.

RECOMMENDED ORDER

It is hereby recommended that the election in Case 16—RC—4095 be set aside and that a second election be conducted.[23]

Dated, Washington, D.C.

[23] In view of my disposition of the issues presented herein, I deem it unnecessary to consider the Union's prayer for certain remedial relief contained in its brief filed with me.

APPENDIX C
(Opinions in First Appeal)

1. *Fifth Circuit Opinion:*

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 23890

S. H. LYNCH & CO., INC.,
Appellant,

versus

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Petition for Review of an Order of the National Labor Relations Board.

(June 8, 1967.)

Before RIVES, WISDOM, and GOLDBERG, Circuit Judges.

PER CURIAM: In the light of *U. S. Rubber Co. v. N.L.R.B.*, 5th Cir. No. 23208 decided February 20, 1967, the Board's order is VACATED and the case is REMANDED to the Board for a hearing on the employer's objections to the election.

2. *Board's Original Decision and Order (July 6, 1966):*

S. H. Lynch and Company, Inc. *and* International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.
Case 16-CA-2618. July 6, 1966

DECISION AND ORDER

Upon charges duly filed by International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 16, issued a complaint dated March 23, 1966, against S. H. Lynch and Company, Inc., herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleges, in substance, that on or about March 7, 1966, the Union was duly certified by the Board[1] as the exclusive bargaining representative of Respondent's employees in the unit found appropriate by the Board and that, since on or about March 14, 1966, Respondent has

[1]Decision and certification of representative in Case 16—RC—4095 (not published in NLRB volumes).

refused to recognize or bargain with the Union as such exclusive bargaining representative, although the Union has requested it to do so.

On or about April 13, 1966, the parties executed a stipulation whereby they agreed to the submission of this case directly to the Board on a stipulated record[2] for findings of fact, conclusions of law, and a Decision and Order. The parties waived a hearing before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision. Respondent expressly reserved the right to contest on the basis of its previous contentions the validity of the findings of fact, conclusions of law, and certification in Case 16—RC—4095. The parties also reserved the right to contest the findings and conclusions and order to be made by the Board in the instant proceedings and to preserve their rights in respect thereto in the event of court review. Further, all parties expressly reserved the right to file briefs.[3]

On April 25, 1966, the Board issued an order approving stipulation and transferring proceeding to the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with

[2]The record as stipulated to by the parties consists of the stipulation and the following: the charge, the complaint and notice of hearing, the answer to the complaint, in Case 16—CA—2618, and the entire proceedings in Case 16—RC—4095.

[3]Briefs have been received from Respondent and the General Counsel.

this case to a three-member panel [Members Fanning, Brown, and Zagoria].

Upon the basis of the aforementioned stipulation, the briefs, and the entire record in this case, the Board makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent is, and has been at all times material herein, a corporation duly organized and existing by virtue of the laws of the State of Texas with its office and place of business at Dallas, Texas, where it is engaged in the sale and distribution of beer. During the past year, which period is representative of all times material herein, Respondent received goods valued in excess of $50,000 from points outside the State of Texas.

Respondent stipulates, and we find, that Respondent is, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and we find, that International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

On March 7, 1966, the Board in Case 16—RC—4095, certified the Union as collective-bargaining representa-

tive of the employees in a unit of all route salesmen, helpers, contact salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaner, but excluding guards, office clerical employees, watchmen, mechanics, and supervisors as defined in the Act.

The parties stipulated that: (1) on March 8, 1966, the Union wrote a letter to the Respondent, requesting Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment; (2) on March 14, the Respondent replied that it would not engage in collective bargaining with the Union in order to obtain judicial review of the Board's decision overruling the Company's objections to the election and certifying the Union.

In its Decision and Certification in Case 16—RC—4095, the Board considered and found no merit in Respondent's exceptions to the Regional Director's Report on Objections to the election. Therefore, it adopted his recommendation that Respondent's objections be overruled. It is well settled that, absent special circumstances, the Board will not reexamine in an unfair labor practice proceeding a determination which it has made in a prior representation case involving the same parties.[1] Respondent does not contend that such special circumstances are present again.

[1] *Corral Sportswear Company*, 156 NLRB 436; *Graphic Arts Finishing Co., Inc.*, 153 NLRB 1327; *The Western and Southern Life Insurance Company*, 142 NLRB 28, 30, and cases cited therein.

Accordingly, we find that the Union was duly certified by the Board as the collective-bargaining representative of the employees of the Respondent in the appropriate unit described above and in the Board's certification, and that the Union at all times since March 7, 1966, has been and now is the exclusive bargaining representative of all the employees in the aforesaid unit, within the meaning of Section 9(a) of the Act. We further find that Respondent has, since March 14, 1966, refused to bargain collectively with the Union as the exclusive bargaining representative of its employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.[5]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The acts of the Respondent set forth in section III, above, occurring in connection with its operations as described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section

[5] See cases cited in footnote 4, *supra*. Also see *Salerno-Megowan Biscuit Company*, 152 NLRB 604.

8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

CONCLUSIONS OF LAW

1. S. H. Lynch and Company, Inc., is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All route salesmen, helpers, contact salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaners, but excluding guards, office clerical employees, watchmen, mechanics, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining, within the meaning of Section 9(b) of the Act.

4. On March 7, 1966, and at all times thereafter, the above-named labor organization was and has been the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining, withing the meaning of Section 9(a) of the Act.

5. By refusing on or about March 14, 1966, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, S. H. Lynch and Company, Inc., Dallas, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of em-

ployment, with International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, as the exclusive and duly certified bargaining representative of its employees in the following appropriate unit:

> All route salesmen, helpers, contact salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaners, but excluding guards, office clerical employees, watchmen, mechanics, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Dallas, Texas, plant, copies of the attached notice marked "Appendix."* Copies of said notice, to be furnished by the Regional Director for

*In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals Enforcing an Order."

Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 16, in writing, within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

APPENDIX

Notice to All Employees

Pursuant to a Decision and Order of the National Labor Relation Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below

with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All route salesmen, helpers, contact salesmen, advertising and merchandising men, warehousemen, and draft beer line cleaner, but excluding guards, office clerical employees, watchmen, mechanics, and supervisors as defined in the Act.

S. H. LYNCH AND COMPANY, INC.,
Employer.

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Sixth Floor, Meacham Building, 110 West Fifth Street, Fort Worth, Texas 76102, Telephone 335-4211, Extension 2145, if they have any questions concerning this notice or compliance with its provisions.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1222

S. H. LYNCH & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. B 1-3) is not yet officially reported. The Board's supplemental decision and order (Pet. App. B 4-45) are reported at 171 NLRB No. 167. The earlier *per curiam* opinion of the court of appeals (Pet. App. C 1) is reported at 377 F. 2d 558, and the Board's initial decision and order (Pet. App. C 2-11) appear at 160 NLRB 113.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1969, and a petition for rehearing was denied on February 27, 1969 (Pet. App. A 1-3). The petition for a writ of certiorari was filed on April 2, 1969, invoking this Court's jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board, following a hearing ordered by the court of appeals, properly found, on the basis of substantial evidence on the record as a whole, that union electioneering had not tainted a representation election.

STATUTE INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), provides in part:

> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. *The Initial Proceedings.* On November 19, 1965, a representation election was held under the Board's aegis, and the petitioner company's employees voted

in favor of the union [1] by secret ballot, 38 to 22 (R. 27).[2] The company filed objections to the election (R. 29-35), alleging that certain statements made in a leaflet issued by the union to the employees one week prior to the election: (1) understated wage rates of the company's own employees; (2) overstated commissions received by union employees at competitors' plants in Houston; and (3) erroneously compared insurance benefits at the company's plant with those received by employees working in Houston under a union contract.

Pursuant to the Board's Rules and Regulations,[3] the Regional Director conducted an administrative investigation and concluded that the objections did not warrant setting the election aside (R. 37-43). The Board sustained the Regional Director and certified the union as the exclusive bargaining representative for the company's employees (R. 80-82).

Thereafter, "in order to obtain judicial review" of the Board's actions in the representation proceeding (R. 100), the company refused to bargain. The ensuing unfair labor practice proceeding culminated in a Board order requiring the company to honor the Board's certification of the union (R. 103-107).

On review of the Board's order, the court of appeals, in a brief *per curiam* opinion citing its earlier

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[1] International Union of United Brewery, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.

[2] "R" refers to the Printed Record in the initial proceeding in the court below; "A" refers to the Joint Appendix to the briefs in the present proceeding in the court below.

[3] Section 102.69(c), 29 C.F.R. 102.69(c).

decision in *U. S. Rubber Co.* v. *National Labor Relations Board*, 373 F. 2d 602, remanded the case to the Board for a hearing on the company's objections to the election (Pet. App. C 1).

2. *The Present Proceedings.* Based upon the evidence adduced at the hearing on remand, the Board made the following findings of fact:

On November 12, 1965, one week before the election, the union mailed a leaflet to each employee in the bargaining unit, contrasting the wages and insurance benefits afforded the company's employees in Dallas with those provided under the union's contract with several beer distributors in Houston (A. 19-20, 121-122). The leaflet stated that "helpers" under the Houston contract received a commission of 4½ cents per case of beer, and that the insurance of the Houston employees is "All paid for by the Company" whereas the company's policy in Dallas "costs you as much as $11.50 a month." At the end of the leaflet was a notification that the union's next meeting would be held on November 18 (A. 122).

On the morning of November 17, the leaflet was brought to the attention of the company's secretary-treasurer. He compared it with a copy of the Houston contract and discovered that the leaflet overstated the commission of helpers under the Houston contract by 2½ cents per case and understated the wages and commission paid to the company's own "bottle route" drivers. He also determined that the insurance benefits received by company employees were greater than those received by the unionized Houston workers (A. 21; 67-77). At approximately 11:00 A.M., he brought

this information to the attention of the company's president (A. 77, 82-83). Although none of the drivers had yet checked in for the day (A. 80), the company made no attempt to inform them of the discrepancies it had found in the leaflet when they did (A. 83).

The next morning, the company's president and secretary-treasurer, after consulting with counsel, concluded that "it was too late to effectively communicate with anybody" (A. 22; 84). That afternoon, at a previously scheduled pre-election conference convened by a Board agent, company counsel questioned the union representative about the leaflet. The union representative, after consulting the Houston contract, admitted that the leaflet was in error, and that the commission received by both the company's helpers and those covered by the Houston contract was 2 cents per case. The union representative suggested that the union and the company jointly draft and issue a leaflet correcting the error (A. 23; 91-93, 98). After conferring privately with company representatives, however, company counsel announced that the company had not "had a chance to fully assess [its] position"; that it was not going "to waive any of [its] rights"; and that it "did not think a letter or a telegram or a leaflet, for that matter, would be effective at this date" (A. 23; 91). Accordingly, the company "turned down the idea of entering into a joint correction" (A. 93).[4]

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[4] The union representative also suggested that the election be postponed so that the employees could be apprised of the

Immediately thereafter, the union representative took steps to correct the errors regarding the helpers' commissions and weekly wages. At a union meeting that evening, attended by approximately 40 employees, or two-thirds of the unit (A. 4, 25; 100), he explained that the company had called his attention to an error in the union's leaflet and that the correct commission in Houston was 2 cents per case, rather than 4½ cents as stated in the leaflet (A. 25; 100-101). He also distributed another leaflet at the meeting, addressed to the company's employees and signed by him, which explained the error (A. 24; 98-101, 207). On the morning of the election, November 19, the union representative and six employees distributed the correcting leaflet to the employees as they entered the plant (A. 4, 25; 101). Each employee who passed through the gates received a copy of the leaflet unless he arrived before 6:00 A.M. (A. 101-102). At 7:00 A.M., when the election began, the handbilling ceased (A. 4, 25; 101).

Based upon the foregoing and the other evidence in the record, the Board reaffirmed its earlier conclusion that any errors in the union's pamphlet did not warrant setting aside the election. In reaching this conclusion, the Board explained that: (1) the union's understatement of the wage rates of the company's *own* employees was the type of misstatement which the voters were capable of evaluating and thus did not undermine their freedom of choice (Pet. App.

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inaccuracies in the leaflet. The company agreed, but the Regional Director declined to postpone the election solely to allow additional time to electioneer (R. 40).

B 6); (2) by its corrective announcement at the November 18 meeting and its leaflet distributions on November 18 and 19, the union had effectively dispelled any inaccurate impressions conveyed by the original overstatement of the Houston commissions and weekly wages (Pet. App. B 8); and (3) the union's statements with regard to the insurance coverage of the unionized Houston employees were in themselves truthful and did not mislead the company's employees into believing the Houston insurance benefits equalled those of the company (Pet. App. B 9). Only after reaching these conclusions did the Board find that, "[f]urthermore," the company had adequate time in which to answer the union's representations as to wage rates and insurance (Pet. B 9-10). The Board, therefore, again ordered the company to bargain with the union (Pet. B 13-15).

The court of appeals then determined that the Board's exercise of its responsibility for insuring the fairness of representation elections was supported by substantial evidence on the record as a whole, and enforcement of the bargaining order was granted (Pet. App. B 1-3). Rehearing and rehearing *en banc* were denied (Pet. App. A 3).

ARGUMENT

The question posed by petitioner (Pet. 2)—"whether the panel which heard the second appeal could, without reason, disregard the 'law of the case' established by the decision of the first panel and hold that the identical undisputed evidence was sufficient to support the very same finding by the Board"—is not

presented on this record. While the court on the first review did, as petitioner asserts (Pet. 6), "necessarily determine" that the mere passage of two days was not of itself sufficient to demonstrate as a matter of law that petitioner had squandered adequate time to reply, the court did not, as petitioner erroneously supposes, affirm the contrary proposition: that as a matter of law the two day interval *could not* have been sufficient. If it had so held, it would have ordered the election set aside. Rather, all the court decided on the first review was that the question should properly have been answered as a matter *of fact*, after an evidentiary hearing. This is confirmed by the first panel's sole reliance on *U. S. Rubber Co.* v. *National Labor Relations Board*, 373 F. 2d 602 (C.A. 5), where a hearing was directed in a similar situation.

Accordingly, when the case returned to the court of appeals, following a hearing and the Board's reaffirmation of the ultimate conclusion originally reached, the second panel of the court was free—and indeed compelled—to make an independent review of the merits of the Board's decision in light of the newly developed full evidentiary record. This conclusion is buttressed by the fact that no circuit judge, including members of the original panel, requested a poll on the possibility of rehearing the second decision *en banc* to resolve the alleged failure to follow the "law of the case". See Pet. App. A 3.

Contrary to petitioner's assertion (Pet. 8-9), the Board did *not* rest its supplemental decision solely on

a finding that petitioner had possessed an adequate opportunity to reply to the pamphlet. The Board made this permissible factual finding only after concluding that any misstatements that might otherwise have had some untoward effect had been adequately corrected, and any taint dissipated, by the union's corrective conduct immediately before the election. Indeed, the court below noted that the Board's finding of adequate time to respond was only "among other things" the basis for its ultimate decision that the election was fair (Pet. App. B 2). The only question really presented, therefore, is whether on this record the Board had a reasonable basis for concluding that the misstatements in the union's November 12 pamphlet had not interfered with employee free choice in the election. There is no need for this Court to undertake further review of the evidentiary support in the record as a whole for the Board's decision on this point, unanimously upheld below. See *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1969.

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